COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

CANTON PROPERTY HOLDING, LLC

v.

CANTON ZONING BOARD OF APPEALS

No. 03-17

DECISION

September 20, 2005

TABLE OF CONTENTS

I. PROCEDURAL HISTORY... 1

A. Jurisdiction 2

B. Motion to Reopen Hearing and Renewal of Motion to Dismiss 3

II. FACTUAL OVERVIEW 5

III. ISSUES 6

A. Traffic Safety 7

B. Stormwater Management 21

IV. CONCLUSION 24

COMMONWEALTH OF MASSACHUSETTS

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CANTON PROPERTY HOLDING, LLC Appellant	)	
v.	)	No. 03-17
CANTON ZONING BOARD OF APPEALS, Appellee	)	

DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR §§ 30.00 and 31.00, brought by Canton Property Holding, LLC (CPH), from a decision of the Canton Zoning Board of Appeals, denying a comprehensive permit with respect to property located off Randolph Street in Canton, Massachusetts. For the reasons set forth below, the decision of the Board is set aside.

I. PROCEDURAL HISTORY

On October 14, 2001, CPH submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, for a project consisting of two components on an 81.3-acre parcel of land off Randolph Street, Canton. They would contain a total of 227 units of rental and ownership housing subsidized under the Federal Home Loan Bank of Boston's New England Fund.

The Board's decision indicates that the public hearing began on August 8, 2002, and continued on September 19 and November 7, 2002 and on April 10, May 1, May 15 and

June 5, 2003. The Board closed the hearing on June 5, and denied the comprehensive permit on July 10, 2003. The Board filed its decision with the Canton Town Clerk on July 11, 2003. On July 14, 2003, CPH filed its appeal with the Housing Appeals Committee. The Committee held a Conference of Counsel on July 30, 2003. The hearing commenced with a hearing and site visit in Canton on October 14, 2003, and continued on December 9, 2003, January 15 and March 23, 2004. The Board and CPH filed their post-hearing memoranda on June 18 and 21, 2004, respectively. On August 9, 2004, the Board moved to reopen the hearing. CPH filed its opposition to the motion on August 10, 2004.

A. Jurisdiction

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. The parties have stipulated that CPH is a limited dividend organization as required by 760 CMR 31.01(1)(a) and that it controls the site of the project as required by § 31.01(1)(c). Pre-Hearing Statement, §§ I.3 and I.4.

The parties specified in the Pre-Hearing Statement that the Appellant was required to establish the jurisdictional requirement of fundability under 760 CMR 31.01(1)(b). Pre-Hearing Statement, § II.B.(i)(2). CPH asserts in its brief that prior to filing with the Board it obtained a determination of fundability from the New England Fund of the Federal Home Loan Bank. It introduced into evidence a project eligibility letter from Fleet Bank. Exh. 2. See 760 CMR 31.01(2). The Board has not raised any opposition in its brief. It therefore has waived its objection. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995).

B. Motion to Reopen Hearing and Renewal of Motion to Dismiss

The parties stipulated in the Pre-Hearing Statement that Canton does not meet any of the statutory minima as required by G.L. c. 40B § 20 and 760 CMR 31.04, and that according to the Housing Inventory prepared by the Department of Housing and Community Development (DHCD) revised as of April 24, 2002, Canton's low and moderate income housing units represent 7.87% of its total housing units. Pre-Hearing Statement, § I. 2.

During the evidentiary hearing, however, the Board moved to dismiss the proceeding on the ground that Canton has affordable units in excess of the 10% minimum goal established by G.L. c. 40B, § 20. It relied upon the settlement of comprehensive permit applications for Pequit View and Pequit Village in Canton, resulting in an additional 180 affordable housing units, more than the 173 units by which the town has been short of its 10% goal. The Presiding Officer denied the motion with leave to the Board to renew it following the close of testimony. The Board has renewed its motion and claims error in the original denial of the motion. It also requests that the hearing be reopened to introduce into the record the fact that CPH's appeal of the Pequit Village and Pequit View permits has been dismissed. CPH does not oppose the admission of the stipulation of dismissal into evidence. Accordingly, for clarity of the record, it is admitted into evidence as Exhibit 34.

The Board renews its argument from its initial motion to dismiss that this matter is controlled by *Zoning Board of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership,* 436 Mass. 811, 767 N.E. 2d 584 (2002), which states:

> Once a town has met its minimum obligations, local zoning requirements and regulations are deemed "consistent with local needs" ... and the HAC is without authority to order a local zoning board to issue a comprehensive permit.... To the extent that a city or town does not have an adequate supply

> of affordable housing … its local autonomy in zoning matters is curtailed. Once its obligation is met, the override power delegated to the HAC is extinguished.

Id. at 823-24. The Board claims that the Court intended this to mean that at the time a town reaches the 10% statutory minimum, whether it is during a hearing before a board or during an appeal before this Committee, the override power delegated to the Committee by Chapter 40B is terminated. In denying the Board's motion to dismiss, the Presiding Officer stated:

> However, the Board fails to draw attention to an earlier passage in the same decision which states, "But if a town has *already* met its share of low and moderate income housing, the local zoning board may deny an application for a comprehensive permit, and HAC has no authority to order a local board to issue one." Id. at 815. This could be taken to indicate that the Court intended that in order for a decision of a board to be consistent with local needs as a matter of law, it must have *already* met the 10% statutory minima at the time it denies the application. This is the same conclusion asserted by the Committee in *Casaletto Estates, LLC v. Georgetown Board of Appeals,* No. 01-12 (Mass. Housing Appeals Committee, May 12, 2003).
>
> Despite these interpretations, neither of these arguments is relevant, as both are merely disconnected excerpts from the *Ardemore* case. They are *dicta.* The *Ardemore* Court was never asked to address the timing of when the 10% minimum must be reached for a decision of the board to be consistent with local needs as a matter of law. Instead, the Court in that case had been asked to decide the wholly unrelated question of "when a comprehensive permit does not specify for how long housing units must remain affordable, how long does such a restriction continue?" Consequently, the Board has failed to persuade me that the *Ardemore* case is instructive on the timing of the 10% statutory minimum.

Canton Property Holding, LLC v. Canton, No. 03-17, slip op at 2 (Mass. Housing Appeals Committee Order, Aug. 12, 2004). We concur with the Presiding Officer's comments above, and with his further remarks that "Presumably this argument could be extended to cases on appeal within the court system as well. Requiring developers to pay tens of thousands of dollars in legal fees and supporting consultant work to have their case dismissed due to a sudden lack of jurisdiction could hardly be in keeping with the legislative intent of 40B,

which according to the *Ardemore* Court was 'to provide an *incentive* to developers to build affordable housing in cities and towns that are deficient in affordable housing....' Id. at 824 (emphasis added)." *Canton, supra,* slip op. at 2 n.1.

The Board also now argues that the approval of this project and the Pequit projects would bring the percentage of affordable units in Canton to more than 12 percent. This, it argues, exceeds the "reasonable" surplus permitted by the Appeals Court in *Zoning Board of Appeals of Greenfield v. Housing Appeals Committee,* 15 Mass. App. Ct. 553, 562, 446 N.E. 2d 748 (1983). However, at least under the facts presented here, assuming that 180 Pequit units would be included in the housing inventory, that number would include both market rate and affordable units in the project; thus 12 percent is not unreasonable.

In *Casaletto Estates v. Georgetown,* No. 01-12 (Mass. Housing Appeals Committee May 19, 2003), we concluded as a matter of law that "the date that should be used in determining whether a particular decision of the Board is consistent with local needs is the date that decision is filed with the town clerk." *Id.* at 21. Accordingly that date is the date to determine whether the town has met the statutory minimum. The Board's motion to reopen the hearing to reconsider its motion to dismiss is denied.[1]

II. FACTUAL OVERVIEW

CPH proposes to build two components on land consisting of approximately 81.3 acres, located off Randolph Street in Canton, Massachusetts. One part, to be known as the Highlands at Canton Meadows would contain 196 units of rental housing (98 one-bedroom,

1. Given our ruling regarding the date to apply in deciding when a town has met the statutory minimum, we need not reach the Board's request to delay our decision until Canton issues building permits for the Pequit projects, so that they are countable as housing stock under DHCD guidelines.

74 two-bedroom and 24 three-bedroom units). The second, Acorn Estates at Canton Hills, would contain 31 housing units on 28 lots (24 single family homes, one two-family home and three duplex style homes). Twenty-five percent of the proposed units would be restricted as low and moderate income units. Pre-Hearing Statement, I. 1. The project is situated in the single residence AA zoning district under the Canton Zoning Map and Canton Zoning By-laws. *Id.,* I. 5. The project is part of a larger development proposed by the developer that would include 300 units located on adjacent land in the Town of Randolph. Those units are not the subject of this appeal. Facts specific to the disputed issues of traffic safety and stormwater are addressed *infra* in the discussions of these issues.

III. ISSUES

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, to make a *prima facie* case before the Committee in this matter, the developer must show, with respect to those aspects of the proposed development that are in dispute, that its proposal complies with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, design, open space or other local concern which supports the denial, and second, that such concern outweighs the regional need for low and moderate income housing. G.L. c. 40B, §§ 20, 23; 760 CMR 31.06(6). Also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hilltop Preserve LTD Partnership v. Walpole*, No. 00-11, slip op. at 4

(Mass. Housing Appeals Committee Apr. 10, 2002); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

CPH argues, relying on testimony of its experts and documentary evidence submitted, that it has sufficient evidence of compliance with state and federal laws or generally accepted design standards with respect to contested issues. The Board contends that CPH has failed to make its *prima facie* showing that the proposal complies with state and federal requirements or other generally recognized standards regarding traffic safety and stormwater management. As we discuss *infra* with regard to these two issues, we find that CPH has met its burden.

A. Traffic Safety

This project is located off Randolph Street in Canton, bordering the Randolph town line. Randolph Street is a largely two-lane residential roadway that runs east-west through three intersections in Canton and three intersections in Randolph that were the subject of traffic volume testimony during the hearing.[2] Exh. 9 p. 6. Although lightly traveled during non-peak hours, it is busy during peak rush hour periods. Tr. I, 99-102. The study prepared by CPH's expert projected total trips generated by the proposed development to be 295 at weekday morning peak hours and 365 at weekday evening peak hours. Ex. 9 p. 19. This would represent a significant increase over the hypothetical as of right trips for the property. Tr. III, 59-64.

The testimony regarding traffic issues focused primarily on the changes in levels of service (LOS) at the intersections expected to be attributable to the proposed development.

2. The three intersections in Randolph that were also studied are not part of the analysis in this case. The site intersections with public ways were not indicated as presenting traffic issues.

Under generally accepted traffic engineering principles, traffic flow through intersections is graded using levels of service "A" through "F." LOS A represents "no delay" optimal conditions, and an LOS F condition, the worst rating available, involves "long delays and tends to be jammed traffic conditions," Tr. I, 113, although it encompasses a wide variation in the degree of traffic congestion. CPH submitted traffic analyses assessing the levels of service at three intersections in Canton as of 2002 ("existing condition"), and projecting the levels of service under both a "no-build condition" scenario and a "build condition" scenario as of 2007. The no-build projection does not include the anticipated traffic effects of the project whereas the build projection includes those expected effects. Exh. 9; Exh. 12H.[3]

1. CPH's burden to show compliance with state requirements.

The Board contends that CPH has failed to show that the proposal complies with state requirements regarding traffic safety. It argues that CPH's burden requires it to meet, for existing roadways in Canton, the design standards established by the Massachusetts Department of Highways (DOH). According to the Board's engineer, DOH would expect a road to be designed to LOS D or better, and it would require a design exception for any proposed improvements that do not result in that standard, and that Mass Highway would suggest a revision to achieve LOS E. Tr. III, 69. The Board argues that because the proposed project is located in an area of Canton and Randolph that already falls below this standard, the project fails to meet generally accepted standards for traffic safety.

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3. CPH's original traffic analysis (Exh. 9) omitted the anticipated effects of some commercial development in the vicinity of the intersection of Route 138 and Randolph Street, which are included in the revised analysis (Exh. 12H).

The fallacy of the Board's argument, however, rests in its application of a standard for the design of new or reconstructed roadways to the evaluation of existing roadways. If the Board were correct, numerous locations throughout eastern Massachusetts would be ineligible for building Chapter 40B housing because of their proximity to overused roadways or roadways not built according to current requirements. See *Spencer Livingstone Assoc. Ltd. Partnership v. Medfield*, No. 90-01, slip op. at 7 (Mass. Housing Appeals Committee June 12, 1991) ("AASHTO guidelines are for new roadways or major reconstruction, and do not necessarily reflect conditions on existing, local, residential streets…."). Also see *Ledges of Peabody Apts. Assoc. Ltd. Partnership v. Peabody*, No. 86-07, slip op. at 11 (Mass. Housing Appeals Committee Apr. 8, 1987). As such, state requirements for new roadways, however helpful for generally considering roadway safety, should not be treated as requirements to be applied rigidly in this context.

In addition, for most of the traffic patterns in question, the overall levels of service are at LOS F for the existing conditions, as well as for the projected "no-build" and build conditions. If the level of service remains the same, there is no indication that from the point of view of a "design standard" there is any violation. Finally, the question of whether the project complies with design standards relates to the construction plans by the developer, rather than off-site conditions. Accordingly, we find that CPH has satisfied its *prima facie* burden with respect to traffic safety.

2. Local Concerns

a. Randolph Street and Washington Street. The intersection of Randolph Street with Washington Street is a T intersection controlled by a stop sign at the westbound end of

Randolph Street, about 3½ miles to the west of the proposed project site. Tr. II, 63-68. The existing level of service for the westbound approach to Washington Street is F. It is anticipated to be LOS F under future no-build or build conditions. Exh. 9; Exh. 12H. Evidence in the record shows that the entire 40B project site including 300 units in Randolph as well as the proposed Canton developments, would contribute a 4 percent volume increase during peak hours.[4] Tr. I, 118-119; Exh. 9; Exh. 12H p. 4.

According to CPH, because of the distance of this intersection from the site, its witnesses did not offer specific mitigation for the site. CPH argues that poor traffic conditions at Randolph Street/Washington Street represent an existing condition, that the proposed development, even assuming the inclusion of a 300-unit development in Randolph will have only a minor impact on the intersection and therefore it is inappropriate to require mitigation by CPH at this intersection under the analysis in *Hilltop Preserve Ltd. Partnership v. Walpole,* No. 00-11, slip op. at 13-14 (Mass. Housing Appeals Committee Apr. 10, 2002). The developer's expert testified that the town could mitigate the existing condition with improvements to signalization, geometric design and police controls.[5] Tr. II, 34-38.

Other than a general reference to the level of service data, the Board did not raise any specific issues in its brief regarding this intersection. It therefore has waived the issue of traffic safety specifically related to this intersection. *Cameron v. Carelli, supra,* 39 Mass.

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4. We do not need to reach the question whether the increase in traffic attributable to the portion of the project to be located in Randolph, and subject to review by the zoning board of that town, should be charged as a "build condition" for the proposed 40B project in Canton.

5. As noted *infra*, during the hearing the developer offered a financial contribution in mitigation of traffic effects at this intersection and the Randolph Street/Route 138 intersection. That offer was not explicitly maintained as a stipulation, and therefore is not before us. See Tr. IV, 37-40; Exh. 33.

App. Ct. at 85, 653 N.E.2d at 598. Further, we find that the traffic conditions at this intersection, 3½ miles from the proposed project site, do not represent a local concern that outweighs the regional need for affordable housing.

b. Randolph Street and York Street. The intersection of Randolph Street with York Street is a T intersection with a stop sign at the northern end of York Street about one-half mile to the west of the proposed project site. According to the Level of Service Analysis Summary, the existing morning and evening peak levels of service for east-west traffic on Randolph Street, as well as projected no-build and build conditions are A or B. However, the reported morning and evening northbound York Street traffic is LOS F for existing and future traffic, under both the no-build and build conditions. Exh. 12H.

CPH has proposed to design and install a traffic signal at this intersection and its expert testified that with the signalization the level of service would improve to LOS C. Tr. III, 121-129; IV, 37. CPH contends that it is offering to mitigate an existing condition with an improvement that is disproportionate to its expected incremental effect on traffic conditions. The Board has raised no objection to this proposal, and in fact requests that if its denial of a comprehensive permit is overturned, the Committee order CPH to design and install the proposed traffic signal at its own expense. Board brief at 21. As with the Washington Street intersection, the Board again raised no specific local concerns about this intersection in its brief other than to request that the offered mitigation be ordered upon a grant of a comprehensive permit. It has therefore waived any local concern issues regarding this intersection. *Cameron v. Carelli, supra,* 39 Mass. App. Ct. at 85, 653 N.E.2d at 598. Moreover, as CPH points out, the traffic impairment at York Street is due in part to the

failure of the town to effectively enforce a ban on left turns during morning peak hours. Tr. II, 61; Exh. 9 p. 7.

We find that although the existing traffic conditions at this intersection may be slightly exacerbated by the proposed development, the anticipated increase in traffic is not a sufficient local concern to warrant denial of a comprehensive permit. However, the developer has offered to mitigate the traffic situation at this intersection and we will include that requirement as a condition of the comprehensive permit grant.

c. Randolph Street and Route 138 is a four–way signalized intersection approximately 2 miles west of the proposed project site's entrance on Randolph Street. This intersection is the focus of the Board's arguments about traffic. Route 138 is a state highway and experiences heavy north-south traffic which is most severe during peak hours. Tr. II, 63-64. The overall levels of service for the intersection under the existing conditions, the projected no-build condition and the build condition are all LOS F.

Route 138 and this intersection are expected to be improved somewhat as a result of modifications funded by Reebok. Reebok has agreed to fund improvements to the intersection as a condition to approval of its worldwide headquarters, which directly accesses Route 138 north of Randolph Street. These improvements include widening Route 138 to two lanes in each direction, providing two lanes on each approach on Randolph Street and improving the traffic control equipment. Tr. I, 106, 147; II, 23-25; III, 82, 133-135; Exh. 9 p. 18. The construction would involve minor takings of adjacent land. Tr. III, 82-83, 86. Although the overall level of service grade for the intersection under the 2007 no-build or

build conditions will not improve as a result of these changes, some of the movements in the intersection would improve. Tr. II, 28; III, 134-135; Exh. 12H.

The, Applicant's Supplemental Traffic Analysis -- Level of Service Analysis Summary, November 2002 (Exh. 12H) shows the following projected levels of service:

Weekday AM	Existing (2002)	No-Build (2007)	Build (2007)
Randolph St. EB left/thru	F	E	F
Randolph St. EB right		C	C
Randolph St WB left		D	F
Randolph St. WB thru/rt	F	D	F
Route 138 NB Approach	F	F	F
Route 138 SB Approach	F	D	D
Overall Intersection	F	F	F
Weekday PM			
Randolph St. EB left/thru	F	F	F
Randolph St. EB right		C	C
Randolph St WB left		C	C
Randolph St. WB thru/rt	F	C	C
Route 138 NB Approach	F	F	F
Route 138 SB Approach	F	F	F
Overall intersection	F	F	F

The traffic flows that would be affected most by the proposed development are the Randolph Street traffic westbound in the morning and eastbound in the evening, although some traffic would be expected in the reverse direction. Weekday evening eastbound left and through traffic is reported to be at LOS F for the existing and projected no-build and build

conditions. Weekday morning westbound right and through traffic is LOS F currently and projected to be LOS D under no-build conditions and LOS F under projected build conditions. Exh. 12H. According to CPH, the site, including the Randolph 40B project of 300 units, would contribute a 5½ percent increase to existing traffic at the intersection. Tr. I, 111-113.[6]

Looking at the traffic another way, the delay for westbound morning traffic doubles from the no-build to the build scenarios for through and right turning traffic and increases five-fold for left turning traffic. In the evening, eastbound through traffic delay is projected to double from the no-build to the build scenario. Both delays and queues are projected to increase, although the exact extent of the increases is hard to predict.[7] The Board's expert testified that the increase in the length of traffic queues at an intersection would have several consequences, including drivers seeking different routes and the potential for a greater

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6. CPH's witness projected that approximately 65 percent of traffic generated by the development would travel westbound out of the site in the morning, and the same proportion would return in the evening. Tr. II, 7-8.

7. The Board relies on questionable projections of traffic delays in the summary to argue that a projected morning weekday peak hour eastbound traffic increase from 67.5 seconds in the no-build scenario to 835.6 seconds in the build scenario is solely attributable to the project. Board brief at 7. We have two concerns with this argument. First, CPH's expert noted that the traffic model was less than accurate for this particular number. Tr. II, 11, 30. Further, as a practical matter, the Board's witness offered no testimony that the project would generate significant traffic in its direction in the morning. Typically residences experience far greater departures than arrivals in the morning, as the Board's witness indicated with regard to as of right development. Tr. III, 62-64. Therefore we have serious doubts about the credibility of these projections. Also, by comparison, the projected morning westbound through/right traffic delay increases from 35.9 seconds (no-build scenario) to 98.9 seconds (build scenario) and the morning westbound left turn traffic delay increases from 40.8 to 204.7 seconds. The comparable projected evening westbound traffic respective delays are 29.8 and 21.6 seconds (no-build scenario) increasing to 21.9 and 32.1 seconds (build scenario). Exh. 12H.

The Board also relied on a projected overall evening weekday peak hour delay of more than 16.52 minutes, which overstates the case by including all intersection traffic, regardless of whether it relates to the proposed 40B project. Board brief at 7; Tr. III, 74.

accident rate. Tr. II, 12. The accident rate for this intersection is 1.23 per million entering vehicles, compared to the statewide average for signalized intersections of 0.87. Thus the location has a higher than average crash rate and was ranked as the 277th highest crash location in the state. Exh. 12H p.3.

Canton has permitted substantial development, both commercial and residential, on or near Route 138 both to the north and south of the intersection, in addition to the Reebok development mentioned above. This development has included:

1) Commerce Center, an industrial center south of the intersection with direct access on Route 138. Commerce Center contributed to intersection design improvements elsewhere in Canton as well as a shuttle bus. CPH argues that it made a similar cash contribution offer. Tr. III, 129-133; Appellant brief at 21.[8]

2) Bank of Canton, a small project off Route 138 south of the intersection. Tr. III, 136;

3) Southfield Estates, a 15-18 lot subdivision on Randolph Street between the CPH site and the intersection. The Board's witness was not aware of any traffic mitigation required of the developer. Tr. IV, 17-18;

4) Green Lodge Gardens, a former 40B project, now an approved 15-25 unit subdivision, off Route 138, north of the intersection. For mitigation, the developer was required to provide a sidewalk along Route 138. Tr. III, 95-96; IV, 19-20;

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8. As noted *supra,* during the hearing, CPH did not stipulate to any financial mitigation for this intersection or the Washington Street intersection. Tr. IV, 37-40; Appellant brief at 21.

5) Pequit Village, a 40B development recently approved, consisting of 159 units has its sole access on Route 138. A condition of the approval provides for widening of Route 138 to facilitate traffic at the site of the entrance to Pequit Village. Exh. 30; see Tr. IV, 21-24; and

6) Pequit View, a 40B development recently approved consisting of 84 units, has its sole access on Route 138. A condition of the approval provides for a payment of $250,000 to the town for purposes designated by the Selectmen. Exh. 30; Tr. IV, 21-24.

d. Feasibility of Improvements to the Intersection. This Committee has previously noted that inadequate streets cannot be grounds for denial of a comprehensive permit when it is technically and financially feasible to improve them. 760 CMR 31.06(8). *CMA v. Westborough,* No. 89-25, slip op. at 36 (Mass. Housing Appeals Committee June 25, 1992). The Board argues, and CPH does not dispute, that improvements to the intersection beyond those proposed by Reebok are not technically feasible. Tr. III, 97. The parties' witnesses agree that the improvements that would be necessary to address the traffic congestion exacerbated by CPH's project would require takings of private property located on the four corners of the intersection. Tr. II, 31-34; III, 131-133; IV, 25. The eminent domain restrictions would constitute "physical circumstances which make the installation of needed service prohibitively costly." 760 CMR 31.06(8).

The Board claims that the increase in traffic resulting from the development affects traffic safety so seriously that the housing should not be approved.[9] The Board argues that it

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9. The Board argues that under 760 CMR 31.07(2), because it is close to or over the 10 percent statutory minimum, its burden of proof should held to be a "rational basis" standard" rather than a "strong showing." Its argument is misplaced. How close the town is to the 10 percent minimum is

therefore has met its "burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible." 760 CMR 31.06(8).[10] It also argues that *Hilltop Preserve* requires the developer to provide a detailed factual analysis to apportion the costs of mitigation between the problems caused by the new development and existing problems. *Id.* at 15 and n.6.

The Board is correct that it is generally not technically feasible to improve the intersection beyond the improvements planned by Reebok. Tr. III, 97. The eminent domain issues prevent widening the roadways to permit dedicated left turn lanes of the size that would significantly reduce the critical traffic delays. Tr. III, 97-98. Therefore, we see that in the immediate future it is unlikely that additional improvements will or can be made. However, that does not resolve the matter here. The Board has pointed to no local bylaw or other requirement that generally restricts development based on traffic in the vicinity reaching poor levels of service or otherwise establishes safety standards more strict than the state standards. Thus, we must consider the context established by our precedents in *Hamlet Development Corp. v. Hopedale,* No. 90-03 (Mass. Housing Appeals Committee Jan. 23, 1992) and *Walega v. Acushnet,* No. 89-17 (Mass. Housing Appeals Committee Nov. 14, 1990). Those two cases, read with *Mapleleaf Development Association v. Haverhill,* No. 88-

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not the issue. Here, the Board has not sought to introduce testimony regarding the proportion of low income residents of the town to address the extent of the regional housing need.

10. CPH argues that the Board failed to adequately raise the question of technical feasibility because it was not expressly stated in the Pre-Hearing Statement. Appellant brief at 17 n.12. However, given that the ability to ameliorate the traffic situation is an integral part of the traffic analysis, and one that CPH had ample opportunity to address in the hearing, we cannot see that it has been prejudiced by any lack of an explicit reference to it in the Pre-Hearing Statement.

14 (Mass. Housing Appeals Committee Jan. 27, 1993), make it clear that in traffic cases, questions of inconvenience are not enough; there must be significant public safety concerns.

e. Extent of Traffic Safety Concern. Our examination must turn to the question of whether the Board has shown a significant local safety concern. We look at both the Board's arguments and the actions of the town with regard to other development in the vicinity of this intersection. The extent of development permitted and the uneven approach to mitigation requirements imposed by the town indicate that there is not a significant public safety concern. Moreover, the Board has not shown that the traffic congestion would lead to an increase in dangerous accidents, rather than "fender-benders." The Board's witness testified that longer traffic queues at an intersection would lead to drivers seeking different routes and to the potential for a greater accident rate. Tr. II, 12. Although the developer's witness acknowledged generally that safety would be improved as a result of the Reebok improvements and a minimization of traffic accidents, Tr. I, 117, we do not find this sufficient to demonstrate a significant safety concern on this record. See *Page Place Apartments v. Stoughton,* No. 04-08, slip op. at 10 (Mass. Housing Appeals Committee, Feb. 1, 2005) (Board has not shown how the "crash rate" translates into a significant safety hazard for the occupants of the proposed apartment complex that would outweigh the need for affordable housing).

The Board's testimony and arguments on the increases in traffic delay caused by the additional trips resulting from development show that the Board has focused more on the issue of convenience. Convenience is not a local safety issue or other local concern that outweighs the need for affordable housing. See *Mapleleaf Development Association v.*

Haverhill, No. 88-14, slip op. at 22 (Mass. Housing Appeals Committee Jan. 27, 1993) ("The delays in making a left turn from Merrill Avenue into Main Street, during the p.m. peak hours will no doubt be a source of inconvenience and annoyance to the tenants of the project who are travelling in that direction at that time. But it hardly reaches the level of a health or safety hazard of gravity sufficient to outweigh the housing need…."). If the roadways were severely overburdened such that additional construction should be prohibited, Canton would likely not be permitting additional commercial and residential development. In fact, the record indicates that the town has continued to permit other development likely to increase traffic, and without expecting mitigation in many instances.

Despite the apparent precision of some of the traffic projections, the reality of the traffic at the intersection resulting from the project cannot be predicted with certainty. As this Committee has previously noted, "[d]espite every effort to make traffic analysis as scientific as possible, ultimately we are dealing with complex variables in an unknown future. In the end, it is inevitable that not only the conclusions, but also some of the assumptions are 'educated guesses.'" *CMA v. Westborough*, No. 89-25, slip op. at 31 (Mass. Housing Appeals Committee June 25, 1992).

Other factors, including the nature of the traffic along the road or of development in the immediate vicinity of the project may bear on whether an intersection is hazardous even though numerical standards cannot be satisfied. Under the circumstances presented here, we cannot agree that the extent of traffic congestion at the intersection located two miles from the proposed project site, even though largely at LOS F, represents a local safety concern that outweighs the need for affordable housing. Given the nature of present-day traffic patterns,

that intersection will be affected by traffic coming from many areas of the town, as well as traffic traveling through Canton, raising questions about how the extent of the traffic increase realistically can be attributed to the project.

Even a showing that some aspects of the intersection will experience deterioration from an LOS of C, D or E to LOS F as a result of the project is not enough to prohibit the development in light of the extensive development being permitted as of right, sometimes without requiring mitigation measures. Moreover, the Board's witness acknowledged that space is available for further as of right development in this area, "more than you think," even if the proposed 40B project is not permitted. Tr. III, 136-138.

CPH raised the question whether this differential treatment violates 760 CMR 31.06(4). However, the as of right residential projects are smaller and likely do not raise the same traffic concerns as the proposed project. Nevertheless, the Board and the town have allowed commercial and unsubsidized residential developments with significant intersection impacts to go ahead with limited or no mitigation requirements. We agree that it is not appropriate to deny the proposed comprehensive permit on this ground. In *Merrimack Meadows Corporation v. Tewksbury,* No. 87-10, slip op. at 17 (Mass. Housing Appeals Committee Aug. 23, 1988), this Committee stated that where a town has welcomed commercial development notwithstanding its traffic impacts, "it is not realistic for the Town to start to address the problem by denying [the 40B] application." *Id.* at 17.

Despite CPH's arguments that it should not be required to mitigate existing problems, it has offered mitigation in the form of signalizing an intersection and agreeing to review a resident shuttle service program. Exh. 33; Tr. IV, 39. The Board requests that if the

Committee overturns its denial of the comprehensive permit, the mitigation measures offered by CPH be specified as requirements in the Committee's decision. Those include a traffic signal to be designed and installed at CPH's own expense at the intersection of York and Randolph Streets at an anticipated cost of $250,000 and a review of a residential shuttle program to reduce vehicle trips by 20 percent. Exh. 33; Tr. IV, 37-40; Board brief at 21.

We find that the Board has not established a local safety concern serious enough to outweigh the need for affordable housing. However, in light of the developer's offers of mitigation, as described *infra* in Section IV. 2. (c), we will require as a condition of the comprehensive permit that CPH perform the traffic mitigation measures it has offered.[11]

C. Stormwater Management

The final local concern briefed by the Board concerns stormwater management.[12] The parties agree that the stormwater management system proposed for the development is subject to the Department of Environmental Protection (DEP) Stormwater Management Policy. Board brief at 13; Appellant brief at 12. See Tr. III, 23. The source of the parties' disagreement lies in whether the developer's stormwater management system will, in fact, meet DEP requirements. The Board argues that the developer has not met its burden of establishing compliance with DEP requirements, and discusses ways in which it considers the stormwater system in general, and the detention basins in particular, do not meet DEP requirements. The appellant's witness, an expert in stormwater management design, testified

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11. CPH also agreed to install a twelve-inch water main in accordance with the recommendation of SEA Consultants, Inc. if its application were approved. Exh. 17; Tr. IV, 15-16.

12. Other issues raised by the Board in the Pre-Hearing Statement, but not briefed, include utility connections, open space, emergency access and on-site traffic circulation. Accordingly the Board has waived these issues. *Cameron v. Carelli, supra,* 39 Mass. App. Ct. at 85, 653 N.E.2d at 598.

that Hydrocad, a generally accepted hydrological model, designed the detention basins to meet all DEP requirements. Tr. II, 85-94. He also testified that the system would meet each of the nine performance standards of the DEP stormwater management policy. Tr. II, 76-84, 85-94, Exh. 12, § III. For the purposes of establishing the Appellant's *prima facie* case, this testimony is sufficient. The Board's evidence introduced to rebut this witness's conclusion does not eliminate the evidentiary value of CPH's evidence. See P.J. Liacos, *Massachusetts Evidence,* § 5.5.3 at 230 (7th ed. 1999). We find that CPH has met its initial burden. The question now turns to whether the Board has demonstrated the existence of a valid local concern.

The Board's expert stated that there must be a detention basin located at the low point of the site to effectively manage stormwater runoff. Tr. III, 30. He testified that Detention Basin A-4 does not meet DEP standards. He stated that spring groundwater in the vicinity of the basin would occur only 16 inches from the ground surface, but that the basin has a bottom elevation 10 feet below existing ground level. Tr. III, 31, Exh. 20 p. 30. See Tr. II, 95. He stated that if the outlet pipe were placed at the bottom of the basin, it would "dewater" the site by "leak[ing] groundwater continuously during the months of seasonally high groundwater" in violation of DEP policy. Tr. III, 26-27, 32. He testified that if, alternatively, the outlet pipe were placed at the 1.5 foot level so as not to wick out groundwater, the dewatering problem would be solved, but it would be inconsistent with DEP stormwater management policy that requires balancing of pre and post development rates of discharge, because "if the basin is full of groundwater when you need it, you cannot retain it." Tr. III, 32-33. Therefore, he stated, the basin would continually contain groundwater, and during a

spring storm when groundwater is high, the stormwater would flow through the basin without treatment. Tr. III, 32-34. He gave the opinion that the basin is incapable of attenuating the peak rate of discharge, in violation of the DEP's stormwater management policy. Tr. III, 34.

The Board argues further that it is not possible otherwise to reconfigure the detention basin in a way that complies with DEP requirements without reducing the number of buildings and units because of restrictions imposed by the gas easement, parking lots and adjacent wetlands. Board brief at 16; Ex. 8, Sheet 9. The Board requests that we find its witness to be more credible than the developer's witness on this issue, Board brief at 16. It requests the Committee to find the denial of the project on this basis to be consistent with local needs.

CPH acknowledges that the depth, sizing, location and configuration of the detention basins might require revision when final engineering plans are reviewed before the Conservation Commission. Its witness offered alternative designs for the detention basin, including relocating or possibly reconfiguring it by increasing the footprint, relocating it or breaking it up into a couple of basins. Tr. II, 97, 114. The Board's witness acknowledged that the detailed engineering questions would ordinarily be resolved during the detailed design phase before the Conservation Commission. Tr. III, 142-144.

The Board relies on no local bylaw or requirement pertaining to stormwater management for its arguments. On this record we need not determine the relative credibility of the two expert witnesses. Compliance with state DEP guidelines ordinarily is not within the Committee's jurisdiction. Rather, conformance with the state Stormwater Management Policy subject to DEP regulation will be reviewed by the DEP or the Conservation

Commission. See *9 North Walker Street Development, Inc. v. Rehoboth,* No. 99-03, slip op. at 6-7 (Mass. Housing Appeals Committee June 28, 2005); *Rising Tide Development, LLC v. Lexington,* No. 03-05, slip op. at 26-27 (Mass. Housing Appeals Committee, June 14, 2005). In any event, even under Chapter 40B, preliminary plans are sufficient at this stage, and compliance with state standards need not be demonstrated in every detail. 760 CMR 31.02(2). Although the state DEP protections under the Stormwater Management Policy should suffice, we will nevertheless require compliance with state law by condition. See Section IV. 2.(b), *infra*. Also see *Washington Green Development, LLC v. Groton,* No. 04-09, slip op. at 21 (Mass. Housing Appeals Committee, Sep. 20, 2005); *Delphic Associates, LLC v. Middleborough,* No. 00-13, slip op at 18 (Mass. Housing Appeals Committee, July 17, 2002).

IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Canton Zoning Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development shall be constructed as shown on drawings by H. W. Moore Associates, Inc. dated June 20, 2002. Exh. 8.

(b) Design and construction shall be in compliance with the state Department of Environmental Protection Stormwater Management Policy and Guidelines. Prior to the commencement of construction, the applicant shall submit to the Canton Department of Public Works a stormwater management report prepared by the project engineer that demonstrates that the final plans meet the DEP Stormwater Management Policy.

(c) CPH shall provide the traffic mitigation it has offered to the Town of Canton, including a traffic signal to be designed and installed at CPH's own expense at the intersection of York and Randolph Streets and a review of a residential shuttle program to reduce vehicle trips by 20 percent. CPH also shall provide installation of a twelve-inch water main in accordance with the recommendation of SEA Consultants, Inc.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: September 20, 2005

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Hearing Officer